Section 29(1) of the Internal Security Act reads:—

"Any person who without lawful excuse carries or has in his possession or under his control any subversive document shall be guilty of an offence against this Part and shall be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten thousand dollars, or to both such imprisonment and fine."

It is true that the maximum fine provided is ten thousand dollars. A fine of $5,000 in this case is manifestly excessive, having regard to all the circumstances, in the sense that a heavier fine entails a heavier default sentence and obviously the fine of $5,000 for a first offence here has the effect of a sentence of imprisonment for two years. The law provides for $10,000 fine or 5 years or both. It is a mockery to sentence a youth for an offence of this sort to a fine of $5,000 where it is clear that he would have difficulty even to find one-tenth of the amount. I have no hesitation in saying that the courts should exercise moderation keeping in mind a sense of proportion when considering sentence and take into account the surrounding circumstances. An arbitrary one-half of the maximum sentence is a wholly wrong principle to adopt and I would quote from the judgment of Taylor J., in *Low Oi Lin v. Rex*[1] at 211:

"I would add that it is very doubtful whether the principle of one-third of the maximum imprisonment was ever generally applied in the Supreme Court; .....

It is impossible to lay down rules for fixing sentences. There are certain factors such as prevalence, difficulty of detection and injury to the public revenue which operate in the direction of severity and others such as leniency to first offenders which operate in the other direction and where, as frequently happens, a number of these factors apply in one case the court must balance them as best as it can.

The sentence ought to be an individual one, personal to the prisoner himself, assessed with regard to his moral and financial circumstances as well as to the nature of his offence."

And I would add the courts should have greater regard for the offence, the circumstances of the case, the public interest and the reformation of the offender.

Appeal allowed.

Solicitors: *R. Rajasingam & Co.*

MAHADI v. PUBLIC PROSECUTOR

[A.Cr.J. (Chang Min Tat J.) July 28, 1969]

[Ipoh — Criminal Appeal No. 27 of 1969]

Criminal Law and Procedure — Statutory presumption — Onus on accused person — Magistrate convicting accused on the ground that he did not believe the defence.

Criminal Law and Procedure — Re-trial — Circumstances under which it would be ordered.

The appellant had been charged with accepting a gratification of $25 an offence punishable under section 9(ii) of the Prevention of Corruption Act, 1961. The learned president convicted the appellant and in his grounds of decision stated that he believed the story of the prosecution and did not believe the defence given by the accused and therefore he found the accused guilty.

Held: (1) if the president did not believe the story of the defence he was nevertheless bound to consider whether the defence, though disbelieved by him, had not raised any reasonable doubt in his mind and as he had failed to do so the conviction must be quashed;

(2) where the prosecution has adduced all the evidence it has and the evidence has established a *prima facie* case against the accused which unrebutted would warrant his conviction, then, the failure of justice occasioned by the trial president in placing the wrong burden of proof on the accused cannot be laid to the door of the prosecution.

Cases referred to:—

(1) *Public Prosecutor* v. *Yuvaraj* [1968] 1 M.L.J. 238, F.C.; [1969] 2 M.L.J. 89, P.C.

(2) *Mat* v. *Public Prosecutor* [1963] M.L.J. 263.

(3) *Mohamed Yatin* v. *Public Prosecutor* [1950] M.L.J. 57.

(4) *Abdul Rahim* v. *King-Emperor* L.R. (1964) 73 I.A. 77.

MAGISTRATE'S CRIMINAL APPEAL.

N.H. Chan for the appellant.

M. Mahalingam (Deputy Public Prosecutor) for the respondent.

Chang Min Tat J. (delivering oral judgment): The appellant, Mahadi bin Serja, a sergeant in the Royal Malaysian Police Force, was charged with accepting a gratification of $25, an offence punishable under section 9(ii) of the Prevention of Corruption Act, 1961.

At the close of the trial the learned president received the benefit of very detailed submissions by counsel for the accused and the Deputy Public Prosecutor, which moved him to thank both counsel for the way in which they had enlightened the court. Counsel for the accused in particular drew the court's attention to the decision in *Yuvaraj's*[1] case in which it was held that where the statutory presumption cast the burden of proof on the accused the accused must be held to have discharged his burden, if he merely raised a reasonable doubt. Despite the benefit of this advice from the Bar, the learned president, in his oral judgment, after reviewing the evidence said these words:—

"In short I believe the story of the prosecution and I do not believe the defence given by the accused. I find accused guilty of the charge and I convict him."

When I came to read his grounds of judgment, the learned president repeated almost verbatim what he said. He wrote:—

"In this case I believe the story of the prosecution and I do not believe the defence given by the accused and as the case stands I find the accused guilty of the charge and I convict him."

Not naturally on appeal, one of the grounds urged was that the court had placed a burden on the defence which the law did not. I have read through the 7-page judgment of the learned president very carefully, and I am unable to find anywhere the slightest reference to whether the defence, even though it was disbelieved, had or had not raised any reasonable doubt in his mind as to the guilt of the accused. For myself, I should not have thought that any magistrate would, after that very excellent judgment, if I may say so, of Suffian J. (as he then was), in the case of *Mat v. Public Prosecutor*[2] have fallen into the error this president did. There, the learned judge had advised in words of extreme simplicity and clarity and in tabular form that, if the magistrate or trial president did not believe the story of the defence, he was nevertheless bound to consider whether the defence, though disbelieved by him, had not raised any reasonable doubt in his mind. I commend to all magistrates that they keep in mind at all times this decision of Suffian J. and, if I may be permitted to add thereto, I would suggest to magistrates and presidents that they refrain from using the words "disbelieve the defence" in their judgments and to bear in mind that they are bound to consider whether the defence has not raised a reasonable doubt in their minds as to the guilt of the accused.

It is clear, therefore, that on this one ground alone the conviction cannot stand.

Mr. Chan for the appellant went on to urge with very great persuasion that I should not order a re-trial. He drew my attention to four cases in our courts where a re-trial was not ordered and to one case where a re-trial was ordered. I think Mr. Chan will agree that these cases have not laid down any yardstick to guide an appellant judge as to when he should order a re-trial and when he should not. Some guidance may, however, be seen in the case of *Mohamed Yatin v. Public Prosecutor*[3] in which Spenser-Wilkinson J. (as he then was) said these words:—

> "If the only defect in the trial had been the failure of the prosecution to call the English-speaking clerk and to produce the hotel register I would not have been prepared to allow the prosecution a second chance to prove their case — all the available evidence which is material ought to be produced at the trial, or an explanation given of its absence, and failure to do this will be liable, as a rule, to result in the conviction being quashed. In the present case, however, I am of opinion, in view of the other matters to which I have referred, that my proper course will be to direct a fresh trial before a different president."

The other matters which the learned judge referred to were the grounds of decision of the learned president, and the judge there said it was not a correct approach in any criminal trial to decide a case as to which story he was prepared to accept.

With respect, I find myself in full accord with what Spenser-Wilkinson J. said. The prosecution ought not to be allowed, in a colloquial phrase, "two bites of the apple". But where the prosecution has adduced all the evidence it has and the evidence has established a *prima facie* case against the accused which unrebutted would warrant his conviction, then, the failure of justice occasioned by the trial president in placing the wrong burden of proof on the accused cannot be laid to the door of the prosecution. A re-trial would not be giving the prosecution a second chance to prove its case. It would merely, under such circumstances, be to uphold the rule of law. I recall a *dictum* of the Indian court in the case of *Abdul Rahim v. King Emperor*[4] that it is as much a miscarriage of justice to acquit a guilty man as to convict an innocent man. With this *dictum*, I respectfully agree. Mr. Chan, however, in the course of a very long address in which with painstaking care, he analysed the evidence for the prosecution and for the defence, sought to persuade me to consider the evidence and in the light of this evidence or his appreciation of it, to come to a decision that there was more than a reasonable doubt as to the guilt of the appellant and that I should refuse to order a re-trial. If I have been hearing the case in the first instance, I might very well find myself carried away by the industry and eloquence of Mr. Chan. But I have not the benefit of hearing or seeing the witnesses in the witness-box and, since in this case credibility of the witnesses is the major factor in coming to a decision, I cannot with any reasonable certainty or confidence regard the cold print of the notes of evidence as conclusive or as discharging the burden either on the prosecution or on the defence. Under the circumstances and with very great regrets, I must decline to view the evidence.

In any event, I do not think I should refer to the evidence in any detail as it would be improper for me to do so in view of the order that I now make.

The appeal of the appellant against conviction is allowed. The conviction is quashed and the sentence set aside. I order a re-trial before another president.

Appeal allowed. Re-trial ordered.

Solicitors: *Cheang Lee & Ong.*